Dato' Anthony See Teow Guan v See Teow Chuan & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–50 OF 2006(W)
NIK HASHIM, ABDUL AZIZ MOHAMAD AND HASHIM YUSOFF FCJJ
23 FEBRUARY 2009

Civil Procedure — Discovery — Application for production of documents — Whether legal professional privilege over legal opinion could be lost by disclosure in List of Documents in Part 1 of the Schedule when privilege expressly claimed in respect of document in Part 2 — Rules of the High Court 1980 O 25 r 5(1)

Evidence — Privilege — Legal professional privilege — Publication of legal opinion — Whether legal professional privilege under s 126 of the Evidence Act 1950 absolute and remained so until waived by privilege holder — Whether client expressly consented to waive privilege — Whether legal professional privilege lost by disclosure to third parties — Evidence Act 1950 s 126

Kian Joo Can Factory Bhd ('KCFJ') was a public listed company in which the appellant was the executive director and general manager, the first respondent was the managing director and the second respondent was the executive director and factory manager. The appellant and the financial director of KJCF met an advocate and solicitor in the firm of Shearn and Delamore ('the advocate') and gave her instructions about the respondents operating a company known as KL Metal Printing (M) Sdn Bhd ('KLMP'). Based on the information provided to her, the advocate rendered a legal opinion ('the legal opinion') addressed to KJCF for the attention of the appellant. The appellant subsequently published the legal opinion to various persons and in due course the respondents obtained a copy of the same. The respondents claimed that the legal opinion was defamatory because it contained allegations that the respondents were dishonest and that they had acted in breach of their duties as directors of KJCF by siphoning money away from KJCF and raising fictitious invoices in favour of KLMP. They therefore instituted proceedings against the appellant for defamation. At the trial of the defamation suit the respondents sought to admit the legal opinion and called the advocate as a witness to answer questions on the legal opinion. However, the advocate claimed that she was unable to answer any questions on the legal opinion by reason of privilege under s 126 of the Evidence Act 1950 ('the Act'). Thereafter a trial within a trial was held to determine the admissibility of the

A legal opinion. At the conclusion of the trial within a trial it was held that the advocate could not be compelled to disclose the communication she had received from the appellant due to the advocate-client privilege as provided for under s 126 of the Act. On appeal the Court of Appeal reversed this decision. The Court of Appeal treated 'privilege' as being co-extensive with
B 'confidentiality' and held that on the facts, the appellant had waived the confidentiality and the privilege attached to the legal opinion and that therefore the communication between the advocate and the appellant was not protected under s 126 of the Act. This was the appeal against that decision after leave had been granted to consider nine questions of law. In their appeal,
C the respondents submitted that the appellant could not resist disclosure by claiming privilege when the legal opinion had already been disclosed and in the possession of the respondents. The first two questions of law raised in the appeal dealt with privilege and confidentiality and the issue whether confidentiality was a characteristic that could be lost; questions 3, 4 and 5
D concerned the meaning and scope of the words 'express consent' in s 126 of the Act and the issue whether the High Court's decision, disallowing disclosure of the legal opinion through the advocate on the grounds of privilege and non-availability of express consent by KJCF to waive the privilege, was correct; questions 6, 7 and 8 concerned the issue whether legal
E professional privilege was lost by disclosure to third parties; and the last question concerned the issue whether the disclosure of the legal opinion in discovery proceedings under O 24 r 5(1) of the Rules of the High Court 1980 ('RHC') in the List of Documents was a waiver of privilege.

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Held, allowing the appeal with costs:

(1) The Court of Appeal in taking the 'loss of confidentiality' approach to determine loss of privilege had failed to recognise the common law
G maxim 'once privileged, always privileged' as embodied in ss 126 to 129 of the Act. This common law maxim has been endorsed and followed in the Malaysian cases (see paras 18, 20 & 22); *Dato' Au Ba Chi v Koh Keng Kheng* [1989] 3 MLJ 445 followed; *Emperor v Mariane G Rodrigues* [1903] 5 Bombay LR 122 distinguished.

H

(2) The finding of the Court of Appeal that 'confidentiality is a characteristic that can be lost' with a corresponding loss of privilege did not accord with the clear imperative terms of s 126 which make no such reference, either expressly or by implication. The exception under s 126
I had nothing to do with loss of confidentiality. It is the privilege that has to be waived and not the confidentiality. Thus the legal professional privilege under s 126 of the Act is absolute and remains so until waived by the privilege holder ie the client (see para 23).

(3) In the instant case, s 126 of the Act permits only one exception when privilege no longer applies ie upon the express consent of the client to the advocate. Thus the term 'express consent' in s 126 imports the requirement that there must be an intentional and deliberate act to waive the legal privilege by the privilege holder ie the client. For these purposes the client was the company KJCF and not the directors of KJCF and therefore it was for KJCF whether to waive the privilege and convey the consent to the advocate when she was called to give evidence. The trial judge found that the appellant's initialing on the legal opinion and his subsequent publishing to other parties did not constitute express consent on the part of KJCF to its advocate. Therefore, on the facts of this case, the High Court's decision disallowing disclosure of the legal opinion through the advocate on the grounds of privilege and non-availability of the express consent by KJCF to waive the privilege was correct (see paras 9, 31)

(4) The persons concerned to whom disclosure was made such as the external auditors of KJCF were not third parties or outsiders for the purposes of legal professional privilege. Since the legal opinion dealt with serious allegations relating to the financial matters in KJCF it had to be brought to the attention of the external auditors who were to be considered as 'insiders' who would ordinarily be concerned with the allegations mentioned in the legal opinion and who had to then decide as to what action should be taken by KJCF (see paras 9, 46)

(5) The finding of the Court of Appeal that privilege was lost or could not be claimed because the legal opinion was already in the hands of the opposite party was unsustainable. The respondents as directors of KJCF would be entitled to see and have custody of any legal opinion obtained by KJCF. In any case even if the legal opinion was in the hands of the opposite party it may be recovered back (see para 23).

(6) Although the appellant had placed the legal opinion under Part 1 of the Schedule instead of Part 2, which carried a list of privileged documents, this did not amount to a waiver of privilege. The appellant had already raised specific objection to production of the legal opinion on the ground of legal privilege under para 2 in the List of Documents. Order 24 of the RHC merely provides a right of inspection of documents disclosed in the List of Documents and cannot be taken as overriding the substantive legal provisions governing legal professional privilege contained in s 126(1) of the Act (see paras 51, 55).

[Bahasa Malaysia summary

Kian Joo Can Factory Bhd ('KCFJ') merupakan syarikat senarai awam yang mana perayu merupakan pengarah eksekutif dan pengurus besar, responden

A pertama merupakan pengarah urusan dan responden kedua pula pengarah eksekutif dan pengurus kilang. Perayu dan pengarah kewangan KJCF bertemu dengan peguambela dan peguamcara di firma guaman Shearn and Delamore ('peguambela tersebut') dan memberinya arahan tentang responden-responden menjalankan sebuah syarikat yang dikenali sebagai
B KL Metal Printing (M) Sdn Bhd ('KLMP'). Berdasarkan maklumat yang diberikan, peguambela tersebut memberikan nasihat perundangan ('nasihat perundangan tersebut') yang dialamatkan kepada KJFC untuk perhatian perayu. Perayu kemudiannya menyiarkan nasihat perundangan tersebut kepada beberapa individu dan responden-responden menerima sesalinan
C nasihat perundangan tersebut. Responden-responden menyatakan bahawa nasihat perundangan tersebut adalah fitnah oleh sebab nasihat itu mengandungi tuduhan-tuduhan bahawa responden-responden tidak jujur dan mereka telah melanggar kewajipan mereka sebagai pengarah KJCF dengan menyalurkan keluar wang daripada KJCF dan mengeluarkan
D invois-invois palsu atas nama KLMP. Mereka kemudiannya mengambil tindakan saman fitnah terhadap perayu. Semasa perbicaraan saman fitnah tersebut, responden-responden memohon untuk memasukkan nasihat perundangan tersebut sebagai keterangan dan memanggil peguambela tersebut sebagai saksi untuk menjawab persoalan berkaitan nasihat
E perundangan tersebut. Walau bagaimanapun, peguambela tersebut menyatakan bahawa dia tidak boleh menjawab sebarang persoalan berkaitan nasihat perundangan tersebut dengan menggunakan alasan hak keistimewaan di bawah s 126 Akta Keterangan 1950 ('Akta'). Satu perbicaraan dalam perbicaraan dijalankan untuk menentukan kemasukan nasihat perundangan
F tersebut sebagai keterangan. Pada penutup perbicaraan dalam perbicaraan tersebut, mahkamah memutuskan bahawa peguambela itu tidak boleh dipaksa untuk mendedahkan sebarang komunikasi antaranya dan perayu berikutan dengan hak keistimewaan peguambela-anak guam di bawah s 126 Akta tersebut. Semasa rayuan, Mahkamah Rayuan mengakas keputusan
G tersebut. Mahkamah Rayuan menyifatkan 'hak keistimewaan' merangkumi 'kerahsiaan' dan memutuskan bahawa berdasarkan fakta-fakta, perayu telah melepaskan kerahsiaan dan hak keistimewaan yang terikat dengan nasihat perundangan tersebut, maka, komunikasi di antara peguambela tersebut dan perayu tidak dilindungi di bawah s 126 Akta. Ini merupakan rayuan terhadap
H keputusan tersebut selepas suatu kebenaran diberikan untuk mempertimbangkan sembilan persoalan undang-undang. Dalam rayuannya, responden-responden menyatakan bahawa perayu tidak boleh menentang pendedahan tersebut atas alasan hak keistimewaan apabila nasihat perundangan tersebut telah pun didedahkan dan ada dalam milikan
I responden-responden. Dua persoalan undang-undang yang dibangkitkan dalam rayuan ialah berkaitan dengan hak keistimewaan dan kerahsiaan dan juga isu sama ada kerahsiaan itu merupakan satu sifat yang boleh hilang; persoalan 3, 4 dan 5 berkaitan maksud dan ruang lingkup perkataan 'persetujuan nyata' dalam s 126 Akta tersebut dan isu sama ada keputusan

Mahkamah Tinggi, tidak membenarkan pendedahan nasihat perundangan tersebut menerusi peguambela itu atas alasan hak keistimewaan dan tiada persetujuan nyata oleh KJFC mengetepikan keistimewaan tersebut tepat atau tidak; persoalan 6, 7 dan 8 berkaitan isu sama ada hak keistimewaan profesional perundangan telah hilang oleh sebab pendedahan kepada pihak ketiga; dan persoalan terakhir ialah berkenaan isu sama ada pendedahan nasihat perundangan dalam prosiding penemuan di bawah A 24 k 5(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dalam senarai dokumen merupakan pelepasan kepada hak keistimewaan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Apabila Mahkamah Rayuan mengguna pakai pendekatan 'kehilangan hak kerahsiaan' untuk menentukan hilangnya hak keistimewaan, Mahkamah telah gagal mengiktiraf maksim *common law* 'once privileged, always privileged' seperti yang termaktub dalam s 126 hingga 129 Akta tersebut. Maksim *common law* ini telah disahkan dan diikut dalam kes-kes di Malaysia (lihat perenggan 18, 20 & 22); *Dato' Au Ba Chi v Koh Keng Kheng* [1989] 3 MLJ 445 diikuti; *Emperor v Mariane G Rodrigues* [1903] 5 Bombay LR 122 dibeza.

(2) Keputusan Mahkamah Rayuan bahawa 'kerahsiaan adalah satu sifat yang boleh hilang' bersamaan dengan hilangnya hak keistimewaan tidak sejajar dengan terma-terma imperatif s 126 yang tidak merujuk kepada persamaan tersebut, sama ada secara jelas atau tidak langsung. Pengecualian di bawah s 126 tidak ada kena-mengena dengan hilangnya kerahsiaan. Hak itu merupakan keistimewaan yang perlu dilepaskan dan bukan kerahsiaan. Maka, hak keistimewaan perundangan di bawah s 126 Akta tersebut adalah mutlak dan hanya boleh dilepaskan oleh pemegang hak keistimewaan tersebut iaitu anak guam (lihat perenggan 23).

(3) Dalam kes ini, s 126 Akta hanya membenarkan satu pengecualian apabila hak keistimewaan tidak boleh diguna pakai lagi, iaitu apabila adanya persetujuan nyata daripada anak guam kepada peguambela. Oleh itu, terma 'persetujuan nyata' dalam s 126 membawa maksud keperluan-keperluan bahawa adanya perlakuan dengan niat dan bersengaja untuk melepaskan hak keistimewaan perundangan itu daripada pemegang hak keistimewaan itu, iaitu anak guam. Bagi tujuan ini, anak guam merupakan syarikat KJCF dan bukannya pengarah-pengarah KJCF. Maka, KJCFlah yang perlu melepaskan hak keistimewaan itu dan perlu menyampaikan persetujuan tersebut kepada peguambela tersebut apabila dia dipanggil untuk memberi keterangan. Hakim perbicaraan memutuskan bahawa tindakan perayu memulakan tindakan nasihat perundangan dan kemudian menyiarkannya kepada

pihak-pihak lain tidak merujuk kepada persetujuan nyata KJCF kepada peguambelanya. Daripada fakta-fakta kes, keputusan Mahkamah Tinggi tidak membenarkan pendedahan nasihat perundangan menerusi peguambela atas alasan hak keistimewaan dan ketiadaan persetujuan nyata oleh KJCF yang melepaskan hak keistimewaan tersebut adalah tepat (lihat perenggan 9, 31).

(4) Pihak-pihak yang didedahkan dengan nasihat perundangan tersebut merupakan juruaudit-juruaudit luar KJCF dan mereka bukanlah pihak ketiga atau 'orang luar' bagi maksud hak keistimewaan profesion perundangan ini. Memandangkan nasihat perundangan tersebut berkaitan dengan tuduhan-tuduhan serius berkaitan dengan hal kewangan KJCF, maka perlulah dibawa untuk perhatian juruaudit-juruaudit luar yang mana akan dianggap sebagai 'orang dalam' yang mana pada kebiasaannya akan bersangkutan dengan tuduhan-tuduhan tersebut dan kemudiannya akan memutuskan tindakan selanjutnya yang perlu diambil oleh KJCF (lihat perenggan 9, 46).

(5) Kesimpulan Mahkamah Rayuan bahawa keistimewaan telah hilang atau tidak boleh dituntut oleh sebab nasihat perundangan tersebut berada dalam tangan pihak lawan, tidak dapat dipertahankan. Responden-responden, sebagai pengarah-pengarah KJCF tentunya akan dapat melihat dan memiliki sebarang nasihat perundangan yang diterima oleh KJFC. Walau apa pun, jika nasihat perundangan tersebut berada dalam tangan pihak lawan, dokumen tersebut boleh dipulangkan semula (lihat perenggan 23).

(6) Walau pun perayu meletakkan nasihat perundangan di bawah Bahagian 1, Jadual, bukan di Bahagian 2, yang mana merupakan senarai dokumen-dokumen yang mempunyai hak keistimewaan, ini tidak membawa makna pelepasan hak tersebut. Perayu telah menimbulkan bantahan spesifik berkenaan pengemukaan nasihat perundangan tersebut atas alasan keistimewaan perundangan di bawah perenggan 2 senarai dokumen. Aturan 24 KMT hanya memberikan hak memeriksa dokumen-dokumen yang dilampirkan dalam senarai dokumen dan tidak boleh mengatasi peruntukan perundangan substantif yang menentukan keistimewaan profesion perundangan dalam s 126(1) Akta tersebut (lihat perenggan 51, 55).]

Notes

For cases on application for production of documents, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2448–2458.

For cases on legal professional privilege, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2155–2168.

Cases referred to

B v Auckland District Law Society [2003] 2 AC 736, PC (refd)
Bullock & Co v Corry & Co (1878) 3 QBD 356 (refd)
Dato' Au Ba Chi v Koh Keng Kheng [1989] 3 MLJ 445, HC (refd)
Daya Shanker Dubey v Subhas Kumar 1992 Cri LJ 319, CA (refd)
Derby & Co Ltd Ors v Weldon Ors (No 10) [1991] All ER 908, CA (refd)
Emperor v Mariane G Rodrigues [1903] 5 Bombay LR 122 (distd)
Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd [1990] 2 NZLR 381 (refd)
Hydrosan Ltd, Re [1991] BCLC 418 (refd)
Jaafar bin Shaari v Tan Lip Eng [1997] 3 MLJ 693, CA (refd)
Mandesan v State of Kerala 1995 Cri LJ 61 (refd)
Minter v Priest [1930] AC 558, HL (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
R v Derby Magistrates' Court; ex parte B [1995] 4 All ER 526, HL (refd)
See Teow Chuan & Anor v Dato' Anthony See Teow Guan [1999] 4 MLJ 42, HC (refd)
See Teow Chuan & Anor v Dato' Anthony See Teow Guan [2006] 3 MLJ 97, CA; [2006] 2 CLJ 292, CA (refd)
Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals [2007] 2 SLR 367, CA (refd)
Sugden v Sugden [2007] NSWCA 312, CA (refd)
Three Rivers District Council v Bank of England [2005] 1 AC 610, HL (refd)
Woodhouse and Co (Ltd) v Woodhouse (1914) 30 TLR 559, CA
Yeo Ah Tee v Lee Chuan Meow [1962] MLJ 413, CA (refd)

Legislation referred to

Evidence Act 1950 ss 126, 126(1), 127, 128, 129
Evidence Act [Singapore] s 128
Rules of the High Court 1980 O 24, O 24 r 5(1), Schedule, Part 1, Form 40

Appeal from: Civil Appeal No W–02–345 of 1999(W) (Court of Appeal, Putrajaya)

Cyrus Das (Romesh Abraham and Mathevi Balakrishnan with him) (Shook Lin & Bok) for the appellant.
V Sithambaram (Chong Chia Chi with him) (Sitham & Associates) for the respondents.

Nik Hashim FCJ:

[1] This appeal raises important questions pertaining to the extent of professional privilege in s 126 of the Evidence Act 1950 ('the Act').

FACTUAL BACKGROUND

[2] Briefly, the facts are that the respondent-plaintiffs and appellant-defendant are the directors and shareholders of Kian Joo Holdings Bhd (the company). The company owned 37% of the issued and fully-paid shares in Kian Joo Can Factory Bhd ('KJCF') which is a public-listed company. The first respondent is the managing director of KJCF whilst the second respondent is the executive director and factory manager of KJCF. The appellant is the executive director and general manager of KJCF.

[3] On 28 October 1996 the appellant and one Ms Alice See, the financial controller of KJCF (Alice), met Ms Jeyanthini Kannaperan (the advocate), then a senior legal assistant in the law firm of Shearn Delamore & Co. The appellant and Alice gave instructions and furnished information to the advocate about the respondents operating a company known as KL Metal Printing (M) Sdn Bhd (KLMP).

[4] Based on the instructions and information provided by the appellant and Alice, the advocate rendered a legal opinion dated 14 November 1996 containing various allegations defamatory of the respondents that had been communicated to her by the appellant and Alice. The legal opinion was addressed to KJCF, for the attention of the appellant, and the appellant subsequently published the legal opinion to various persons. The respondents were also given a copy of the legal opinion by the external auditors of KJCF. The respondents pleaded in the statement of claim that the allegations in the legal opinion were defamatory of them and bore the natural and ordinary meaning that they had dishonestly and in breach of their duties as directors of KJCF used KLMP as a vehicle to siphon sums of money away from KJCF by, in particular, the raising of fictitious invoices in favour of KLMP.

[5] Hence the respondents brought an action for defamation against the appellant to vindicate their injured reputation and integrity and seek damages as prayed for in their statement of claim dated 6 February 1997.

[6] At the trial of the action, the respondents called the advocate as their first witness. In the course of the examination of the advocate, the respondents sought to admit the legal opinion dated 14 November 1996 but

the advocate claimed that she was unable to answer any questions on the legal opinion by reason of privilege under s 126 of the Act. The High Court then ordered a trial within a trial to determine the admissibility of the legal opinion.

[7] Upon the conclusion of the trial within a trial, the learned judge (James Foong J as he then was) held that the advocate could not be compelled to disclose the communication she had received from the appellant and to produce the legal opinion on the ground of advocate — client privilege as provided for under s 126 of the Act. The judgment of the High Court is reported in *See Teow Chuan & Anor v Dato' Anthony See Teow Guan* [1999] 4 MLJ 42.

[8] On 24 March 2006 the Court of Appeal (Abdul Kadir Sulaiman JCA (later FCJ), Tengku Baharudin Shah JCA and Azmel Maamor JCA (later FCJ) Reversed the decision and held that, on the facts, the appellant had waived the confidentiality and the privilege attached to the legal opinion, and that the communication between the appellant and the advocate was not protected under s 126 of the Act, and ordered that the trial be continued at an early date. The judgment of the Court of Appeal is reported in *See Teow Chuan & Anor v Dato' Anthony See Teow Guan* [2006] 3 MLJ 97; [2006] 2 CLJ 292 (CA).

QUESTIONS OF LAW

[9] On 22 November 2006 this court granted leave to the appellant to appeal against the decision of the Court of Appeal on the following questions:

(1) Whether the principle at common law relating to legal professional privilege, namely, 'once privileged, always privileged' is recognised under the Act, and if so, to what extent.

(2) Whether the principle of confidentiality is co-extensive with that of legal professional privilege under s 126 of the Act so that the privilege continues until there is a waiver.

(3) Whether the circumstances enumerated in ss 126 to 129 of when legal professional privilege can be lost are exhaustive.

(4) Whether the term 'express consent' in s 126 imports the requirement that there must be an intentional and deliberate act to waive legal privilege by the privilege holder.

(5) Whether the Act recognises the common law rule of loss of legal professional privilege by implied waiver or that waiver could be imputed by the conduct of the holder.

(6) Where a corporation is the privilege holder, whether its directors and principal officials are classifiable as third parties or outsiders for purposes of legal professional privilege.

(7) Where the privilege holder is a corporation, whether its professional advisers like accountants or auditors, in particular its external auditors would be considered as third parties or outsiders for the purposes of legal professional privilege.

(8) Whether the principle of a limited waiver by disclosure of a privileged document to specified persons which at common law could not cause loss of legal privilege applies in Malaysia.

(9) Whether legal professional privilege over a document could be lost by disclosure in the List of Documents under O 24 r 5(1) in Part 1 of the Schedule when privilege is expressly claimed in respect of the document in Part 2.

[10] With regard to the questions, I would answer them in order of questions (1) and (2) under privilege and confidentiality; questions (3), (4) and (5) under waiver and express consent; question (6), (7) and (8) under disclosure and third parties, and question (9) under discovery under O 24 of the Rules of the High Court 1980 ('the RHC').

GENERAL

[11] For ease of reference, I reproduce s 126 of the Act which reads as follows:

(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the cause and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure —

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

[12] Section 126 comes under Chapter IX of the Act under the heading 'Witnesses' dealing with what witnesses may or may not say and with their privileges and immunities. It is important to note that s 126 is aimed at the advocate who is a witness. This section provides that no advocate shall at any time be permitted to disclose any communication made to him by or on behalf of his client for the purpose of his employment unless the client gives his express consent. It also extends to any advice given by him to his client. In the case of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR 367, the Singapore Court of Appeal observed on s 128 of the Singapore Evidence Act (which is in pari materia with s 126 of the Act) as follows (as summarised in the headnote):

> In Singapore, legal professional privilege was (sic) a statutory right enacted in ss 128 and 131 of the Act. As the Act was modelled on the Indian Evidence Act 1872 (Act 1 of 1872), which itself had its roots in English law, the court would need to refer to English decisions in order to determine the scope of the said provisions as well as the current state of the law, while bearing in mind that not all English law principles could be used for this purpose as a result of s 2(2) of the Act.

At p 382 para 32, the court commented:

> As is evident from its language, s 128 applies only to an advocate or solicitor, but not to the client. He may not (a) disclose any communication made to him by or on behalf of his client, or (b) state the contents or condition of any document of which he has become 'acquainted', or (c) disclose any advice given by him to his client, if all these 8 events occurred 'in the course and for the purpose of his employment as such advocate or solicitor'.

[13] The importance of legal professional privilege in the administration of justice needs no emphasis. If authorities are needed then I would quote the following cases.

[14] In *R v Derby Magistrates' Court; ex parte B* [1995] 4 All ER 526, Lord Taylor CJ, speaking in the House of Lords, said at p 540:

> The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.

[15] In endorsing the above passage in the Privy Council case of *B v Auckland District Law Society* [2003] 2 AC 736, Lord Millet said at p 756 paras 44–45:

> Some principles are well established and were confirmed by Lord Taylor CJ in *R v Derby Magistrates' Court, Exp B* [1996] AC 487, at p 503 G–H. First, the privilege remains after the occasion for it has passed: unless waived 'once privileged, always privileged'. Secondly, the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings and whether by the prosecution or the defence. Thirdly, the refusal of the claimant to waive his privilege for any reason or none cannot be questioned or investigated by the court. Fourthly, save in cases where the privileged communication is itself the means of carrying out a fraud, the privilege is absolute. Once the privilege is established, the lawyer's mouth is 'shut for ever': see *Wilson v Rastall* (1792) 4 Durn & E 753, at p 759, per Buller J. The society has not alleged that any of the documents fall within the excepted category, but if any of them does it retains the right to make such a claim hereafter.
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> It is, of course, well established that the privilege belongs to the client and not to his lawyer, and that it may not be waived by the lawyer without his client's consent. But the privilege is available to the client whether he is a layman or a lawyer; even a lawyer — perhaps especially a lawyer — has need of the services of another lawyer if he becomes personally embroiled in legal proceedings.

[16] In the *Three Rivers District Council v Bank of England* [2005] 1 AC 610, Lord Scott of Foscote said at p 647:

> ... Why is it that the law has afforded this special privilege to communications between lawyers and their clients that it has denied to all other confidential communications? In relation to all other confidential communications, whether between doctor and patient, accountant and client, husband and wife, parent and child, priest and penitent, the common law recognises the confidentiality of the communication, will protect the confidentiality up to a point, but declines to allow the communication the absolute protection allowed to communications between lawyer and client giving or seeking legal advice.

[17] With the above principles in mind, I now proceed to answer the questions posed.

Questions (1) and (2): Privilege and confidentiality

[18] These two questions arose as a result of the findings of the Court of Appeal which held that the High Court was erroneous to hold that once the legal opinion was privileged, it would remain so forever, even if it was published to third parties. The Court of Appeal further ruled that confidentiality is an essential requirement in s 126 (see para 33 of the judgment), and found on the facts of this case that the communication by the

appellant to the advocate was not intended to be confidential (see paras 34–49) and therefore the privilege under s 126 does not apply (see para 32) and cited *Emperor v Mariane G Rodrigues* [1903] 5 Bombay LR 122 in support.

[19] To lend support to the above findings the respondents submitted that the principle at common law 'once privileged, always privileged' does not extend the privilege to protect a communication which is not confidential or has subsequently lost its confidentiality. The principle of confidentiality is co-extensive with that of legal professional privilege under the section. There can be no privilege without confidentiality. Once confidence ceases privilege ceases.

[20] With respect, I do not agree. I agree with the appellant that the Court of Appeal, in taking the 'loss of confidentiality' approach to determine loss of privilege, had failed to recognise the common law maxim 'once privileged, always privileged' (see per Cockburn CJ in *Bullock & Co v Corry & Co* (1878) 3 QBD 356 at p 358) as being embodied in ss 126–129 of the Act. This common law maxim has been endorsed and approved by the high authority of the House of Lords and Privy Council in the cases quoted earlier where the privilege was accepted as being absolute. The maxim has hitherto been followed in Malaysia as seen in the High Court case of *Dato' Au Ba Chi v Koh Keng Kheng* [1989] 3 MLJ 445, which was adopted by the learned trial judge in the present case. Relying on the wording of s 126 of the Act, Eusoff Chin J (as he then was) in *Dato' Au Ba*'s case held the maxim 'once privileged always privileged' applied. The court said at p 447:

> Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is 'always privileged' (per Cockburn CJ in *Bullock v Corry & Co*).

[21] It may be noted that *Dato' Au Ba*'s case went on appeal to the then Supreme Court and the High Court's decision was upheld but unfortunately there was no written judgment of the Supreme Court. Hence, the importance of this decision.

[22] The case of *Emperor*, relied upon by the respondents, is easily distinguishable. That case deals with a communication from a client to a solicitor for the purpose of communicating to a third party, the complainant (not the client). The solicitor had the client's instructions to make to the complainant the statements communicated by the client to the solicitor. So there was nothing of a confidential nature in the communication. Whereas our case concerns legal advice or communications made to an advocate with

a view of obtaining legal advice, which would necessarily be privileged. Therefore, reliance on *Emperor* by the Court of Appeal is misconceived.

[23] Similarly, the Court of Appeal's finding at p 311 that 'confidentiality is a characteristic that can be lost' with a corresponding loss of privilege does not accord with the clear imperative terms of s 126 which makes no such reference, either expressly or by implication, to such a contention.

[24] It is true that a legal opinion sought is implicitly confidential but the exception under s 126 has nothing to do with loss of confidentiality elsewhere but with whether the privilege holder ie the client is prepared to waive the privilege for the court proceedings. It is the privilege that has to be waived and not the confidentiality. Thus, the finding of the Court of Appeal in treating 'privilege' as being co-extensive with 'confidentiality' is untenable.

[25] Hence, I hold that the legal professional privilege under s 126 of the Act is absolute and it remains so until waived by the privilege holder, ie the client.

[26] Accordingly, my answer to question (1) is in the affirmative while my answer to question (2) is in the negative.

Questions (3), (4) and (5): Waiver and express consent

[27] The questions here concern the meaning and scope of the words 'express consent' in s 126 of the Act.

[28] The Court of Appeal, in rejecting the appellant's argument that the 'express consent' under s 126 must be express and that the consent must be directed to the advocate, held that the following facts or points of conduct constituted express consent on the part of the appellant thereby waiving the privilege that attached to the legal opinion:

(i) By writing the words 'Alice' 'Tunku', dating them 14 November, and initialling on the legal opinion and subsequently publishing it to other persons.

(ii) The respondents were given a copy of the legal opinion at the meeting held on 27 November 1996 with the external auditors, who received it from the appellant.

(iii) The legal opinion was exhibited under exh 'STC-2' of the respondents' affidavit in reply to the appellant's application for striking out and was

read out by the respondents' counsel in the striking out proceedings before the registrar and on appeal before the same judge, who thereafter also heard the case.

(iv) By placing the legal opinion under Part 1 of Schedule 1 of the List of Documents under item 10.

[29] In support of the above findings the Court of Appeal cited the following authorities:

(i) *Daya Shanker Dubey v Subhas Kumar* 1992 Cri LJ 319.

(ii) *Legal Professional Privilege in Australia* by Dr Ronald J Desiatnik at pp 102 and 103.

(iii) *Derby & Co Ltd & Ors v Weldon Ors (No 10)* [1991] All ER 908.

(iv) *Jaafar bin Shaari v Tan Lip Eng* [1997] 3 MLJ 693.

[30] Before us, learned counsel for the respondents argued that the Court of Appeal was right in adopting the purposive approach in interpreting s 126 and held that the privilege had been waived by disclosing the legal opinion to various third parties including the respondents. The appellant could not resist disclosure by claiming privilege when the document had already been disclosed and in the possession of the respondents.

[31] It must be noted that s 126 of the Act was enacted to give protection to legal communications and legal advice between the advocate and his client from disclosure. The section uses strong language in imposing the prohibition. No advocate 'shall at any time be permitted' to disclose such communication 'unless with his client's express consent'. By its terms, the section is quite straightforward. As such, the Court of Appeal had no choice but to give effect to the plain meaning of the words used in s 126 of the Act rather than seek to expand or modify the statutory provisions by way of reference to common law principles. McDougall J in delivering the judgment of the Court of Appeal of New South Wales in *Sugden v Sugden* [2007] NSWCA 312, said at para 34:

> ... the availability of client legal privilege was to be decided in accordance with the relevant provisions of the Evidence Act.

Hence, the various authorities and tests on the common law principles of waiver or acquiescence relied on by the respondents and adopted by the Court of Appeal cannot be taken to apply in the face of the specific and singular statutory exception which is clearly set out in the section.

In the instant case, s 126 of the Act permits only one exception when privilege no longer applies ie upon the express consent of the client given and

directed to the advocate who is called to court to disclose the professional communication made to him by his client or the advice given by the advocate. The case of *Dato' Au Ba*, makes that clear at p 447:

> ... since the law requires the defendants *must first give their express consent to their solicitors* before the document could be released to anyone. Such consent could have been endorsed in the document itself, or given separately in writing to the effect that they consented to the document being released to the first plaintiff
>
> (Emphasis added.)

Thus, the term 'express consent' in s 126 imports the requirement that there must be an intentional and deliberate act to waive the legal privilege by the privilege holder, ie the client.

[32] The need for the client's express consent before the privilege can be waived is the same in Singapore. In *Yeo Ah Tee v Lee Chuan Meow* [1962] MLJ 413, the Singapore Court of Appeal held that the privilege attaching to a statement supposedly made by the client to the Legal Aid Bureau, the client's solicitors, which the client denied making, was not expressly waived by the client's saying that he would not object to the statement being produced if he made it. Buttrose J speaking for the court, said at p 414:

> ... I am unable to construe it as an express waiver by the plaintiff of the privilege and indeed, in my view, it falls short of that express consent of the client which is required before any such disclosure can be made. His counsel objected strongly to the evidence and claimed privilege throughout.

[33] So also is the position in India. In *Mandesan v State of Kerala* 1995 Cri LJ 61, the notion that in the absence of 'express consent' there could be loss of privilege by a failure to object or by waiver or acquiescence on the part of the client was advocated. In that case the advocate had already given evidence of the communication between him and the client and no objection had been raised on the part of the client but the High Court ruled that such communication was inadmissible under s 126. Thomas J said at p 62:

> ... But failure to raise objection would not remove the lid of confidentiality attached to such communication between the advocate and his client. The privilege embodied in s 126 of the Evidence Act is not liable to melt down on the principle of waiver or acquiescence. This can be more understood from s 128 of the Act which says that by giving evidence, a party shall not be deemed to have consented to such disclosure as is mentioned in s 126. It is only when the party calls such advocates as a witness that the party shall be deemed to have consented to such disclosure, that too only if he questions the witness about it. Section 126 uses strong language in imposing the prohibition. No advocate 'shall at any time be permitted' to disclose such communication 'unless with his client's express consent'. A failure on the part of the client to claim privilege cannot be stretched

to the extent of amounting to 'express consent' envisaged in the provision (*Bhagwani v Decoram* AIR 1933 Sind 47).

[34] Thus, the common law rule of waiver by implication or imputation is not recognised by the cases under either the Malaysian, Singapore or Indian Evidence Act.

[35] It was common ground that the client was the company KJCF and not the directors. Since KJCF was the client of the advocate, the privilege holder was KJCF and not the advocate (see *Minter v Priest* [1930] AC 558 at p 579) of the individual directors. It is for KJCF whether to waive it and convey the consent to the advocate when called to give evidence. Augustine Paul J (now FCJ) in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 179:

> As the privilege is that of the client, he may expressly waive it under s 126 or impliedly under s 128 of the Evidence Act 1950 by calling the advocate as his witness.

Since the trial judge found that no such consent was given, the notation of the words 'Alice' 'Tunku' dated 14 November and the initialling on the legal opinion by the appellant and his subsequently publishing it to other persons hardly constitute express consent on the part of KJCF to its advocate, PW1. At most, the notation was an internal communication within KJCF.

[36] The disclosure of the legal opinion by the respondents would not remove the privilege attached to the legal opinion.

[37] Under s 126 of the Act the position is as stated in *Dato' Au Ba*'s case which was a case where the communication by the letters between client and advocate had been originally included by mistake in the agreed bundle of documents. There was therefore disclosure to the opposite party. But the High Court allowed the document to be removed or expunged from the agreed bundle on the ground of legal privilege. The earlier disclosure was held not to be a disqualifying ground.

[38] The Indian decision of *Daya Shanker Dubey*, relied on by the respondents seems to rest on the peculiar facts of that case and the legal proposition itself is inconsistent with the decision in the above cases.

[39] In the present case, it is KJCF's advocate, PW1, who claimed that she was unable to disclose the legal opinion by reason of privilege under s 126 of the Act. The appellant, acting on behalf of KJCF, was duty bound to support the privilege accorded to KJCF. Thus, the real issue before the court was

whether or not the refusal by the advocate PW1 to disclose the legal opinion on the ground of privilege was correct. The question of legal professional privilege being raised by the appellant in the defamation proceedings as a defence to the respondents' claim cannot be in issue. So, on the facts of this case, the High Court's decision disallowing disclosure of the legal opinion through PW1 on the grounds of privilege and non-availability of express consent by KJCF to the witness to waive the privilege is correct. The learned judge said:

> The client has every right to object since the opening phrase of this particular section reads: 'No advocate shall be permitted...' Thus unless express consent in writing by client is given to PW1 the legal opinion cannot be disclosed through her.

[40] Hence my answers to questions (3) and (4) are in the affirmative while my answer to question (5) is in the negative.

Disclosure and third parties: Questions (6), (7) and (8)

[41] These questions arose as a result of the finding of the Court of Appeal which ruled that the privilege was lost by disclosure to 'third parties'. The court said at p 311 para 52:

> The conduct of the defendant (appellant) in expressly waiving the privilege by disclosing and publishing the legal opinion to third parties is illustrative of the principle of express waiver.

By 'third parties' the Court of Appeal was evidently referring to the Chairman of the Board of Directors, the Directors, the Financial Controller of KJCF and the two external auditors (Yap and Chew of Ernst & Young) because they were the persons to whom the legal opinion was disclosed.

[42] I agree with the appellant that the Court of Appeal had failed to appreciate that the privilege holder is a corporation and that KJCF as an artificial entity has to function through its human agencies. This usually would be its principal officials whether they are the directors or the top management personnel of the company or its professional advisers. Thus, both the respondents and the appellant, as the directors of KJCF, would be entitled to see and have custody of any legal opinion obtained by KJCF.

[43] In *Woodhouse and Co (Ltd) v Woodhouse* (1914) 30 TLR 559, the English Court of Appeal held that where a company obtains legal advice, a shareholder of the company has a right to see it except where the shareholder is engaged in hostile litigation with the company. So, the right of directors of a company who are in management is surely a stronger right than that of an

ordinary shareholder (see also *Re Hydrosan Ltd* [1991] BCLC 418). Therefore, it was erroneous for the Court of Appeal to consider Alice, the KJCF's financial controller, as a 'third party', as KJCF's chief accounting official, she would surely be concerned with the legal opinion over the funds of KJCF and to advise on the allegation that the funds were being diverted to KLMP which was operated by the respondents.

[44] Further, the Court of Appeal was also erroneous in classifying the two external auditors of KJCF from Ernst & Young as 'third parties'. As auditors they were required by law to oversee the management of the finances of KJCF. They would have to be informed of any financial mismanagement within KJCF and were entitled to both enquire into and pursue such allegations. It is for this purpose that all companies are required by law to employ external auditors who have to submit their independent report annually to the shareholders. It is all the more important in the case of KJCF, a public-listed company.

[45] In the present case the legal opinion had dealt with a serious allegation that 'the directors (respondents) are said to have used KLMP as a vehicle to siphon substantial sums of money from KJCF by way of sale of cans from KJCF to KLMP at a loss to KJCF, raising fictitious invoices in favour of KLMP for work done/cans supplied by KJCF,...'. Surely this was a matter that must be brought to the attention of the external auditors. For instance, in *Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd* [1990] 2 NZLR 381, the disclosure of privileged documents to the insurance broker who arranged the policy, the subject matter of the claim, was held not to be a waiver. The broker was an agent of the party claiming privilege. Our case is even stronger where the company KJCF was under a duty to notify the external auditors of the legal opinion it had received on this serious allegation over its finances.

[46] So, the persons concerned to whom disclosure was made were not 'third parties' or outsiders for the purpose of legal professional privilege. They are to be considered as insiders who would ordinarily be concerned with the allegations mentioned in the legal opinion. They were the persons who had to decide on the recommendations made in the legal opinion as to what action should be taken by KJCF.

[47] However, it may be noted that the only 'outsiders' would be:

(i) the respondents' lawyers brought in by the respondents themselves at the meeting on 27 November 1996 who had sight of the legal opinion. The respondents surely cannot complain about this because it is not a 'disclosure' by the appellant but by the respondents themselves.

(ii) the presence of Puan Misslee Harian, the legal adviser of Antah Holding, at the meeting on 4 December 1996. This legal adviser was present at Tunku's behest and was therefore his 'agent'. A disclosure to an agent or representative would not be disclosure to a non-party (see *Harbour Inn Seafoods*).

[48] There is another matter which was referred to by the Court of Appeal which needs to be addressed. The Court of Appeal at paras 54–55 of the judgment ruled that privilege could not be claimed because the legal opinion was now in the hands of the respondents, having been given to them by the external auditors who received it from the appellant. The case of *Daya Shanker Dubey* was cited in support to say that privilege could not be claimed because it was already in the possession of the opposite party. It must be noted that *Daya Shanker Dubey* was largely a contempt case which had stated the proposition on legal privilege too broadly. The case failed to note that where legal professional privilege is claimed the rule is one of admissibility of the document in whosesoever hand it is found. A document cannot be admitted as evidence if it is privileged even if it is in the hands of the opposite party. For example, if it is privileged, a document in the hands of an opposite party may be recovered back (see *B v Auckland District Law Society*). If it has wrongly been released to the opposite side in discovery proceedings or otherwise, it may be injuncted from use (see *International Business Machines Corp*).

[49] Thus, the finding of the Court of Appeal that privilege was lost or could not be claimed because the legal opinion was already in the hands of the opposite party is unsustainable.

[50] Accordingly, my answers to questions (6) and (7) are in the negative while my answer to question (8) is in the affirmative.

Discovery under O 24 of the RHC: Question (9)

[51] This last question arose as a result of the finding of the Court of Appeal which ruled that the disclosure of the document in discovery proceedings under O 24 r 5(1) of the RHC in the list of documents was a waiver of privilege. This is what the Court of Appeal said at para 67:

> In our judgment since the defendant (appellant) had placed the legal opinion under Part 1 of Schedule 1 under item No 10, the defendant (appellant) has *expressly consented* to produce the document and for which he claims no privilege. Therefore the defendant (appellant) had waived the privilege to the legal opinion and it is admissible in evidence at the trial.
>
> (Emphasis added.)

[52] Under O 24 r 5(1) the list of documents must be in Form 40. The appellant had disclosed the legal opinion in Part 1 of Schedule 1 under item No 10. However, there was a rider claiming legal privilege in the appellant's list of documents at para 2 which reads:

> The Defendant (appellant) objects to produce the documents enumerated in Part 2 of the said Schedule 1 on the ground that they are privileged. The Defendant (appellant) further objects to produce the documents enumerated in Part 1 of the said Schedule 1 Nos. 1 to 10 on the grounds set out in the Defence filed herein and in particular paragraph 9 thereof.

[53] The respondents argued that if the appellant had intended to claim privilege to the legal opinion he ought to have placed it under Part 2 and not under Part 1 of Schedule 1 in the List of Documents. By placing the legal opinion under Part 1 of Schedule 1 the appellant had chosen to waive the privilege attached to it.

[54] It is true that the appellant had placed the legal opinion under Part 1 of Schedule 1 in the list of documents but he had raised specific objection to production of the legal opinion on the ground of legal privilege under para 2 in the list of documents as stated above. This, in my view, is sufficient as it complies with O 24 r 5(2) of the RHC which states:

> If it is desired to claim that any documents are privileged from production, the claim must be made in the list of documents with a sufficient statement of the grounds of the privilege.

[55] Thus, the mere placement of the privileged document in Part 1 is not fatal and does not amount to waiver of privilege. Therefore, the Court of Appeal's finding that the appellant *expressly consented* to production of the legal opinion was unwarranted as such finding disregarded the specific objection taken by the appellant in his list of documents. Further, the Court of Appeal failed to appreciate that O 24 of the RHC merely provides a right of inspection of documents disclosed in the list of documents and therefore cannot be taken as overriding the substantive legal provisions governing legal professional privilege contained in s 126(1) of the Act.

[56] Hence, my answer to question (9) is in the negative.

CONCLUSION

[57] All the nine questions of law have been answered. The decision of the learned High Court judge that PW1 could not be compelled to disclose the communication she had received from the appellant and to produce the legal

A opinion dated 14 November 1996 at the trial is therefore correct. The communication and the legal opinion are inadmissible. Accordingly, the appeal is allowed with costs. The orders of the Court of Appeal are set aside. The orders of the learned High Court judge are restored and affirmed. The deposit is to be returned to the appellant.

B

[58] My learned brothers Abdul Aziz Mohamad FCJ and Hashim Yusoff FCJ have read this judgment in draft and have expressed their agreement with it.

C *Appeal allowed with costs. Court of Appeal's order set aside. High Court judge's orders restored and affirmed.*

Reported by K Nesan

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